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No. 82-1698

In the Supreme Court of the United States

OCTOBER TERM, 1983

MABEL NEVIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the decision of the Chief Chemical Officer of the United States Army to use a particular strain of bacteria as part of a broader decision regarding whether and how to conduct a simulated germ warfare attack on San Francisco, California in 1950 was a "discretionary function" and thus not properly the basis for a suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 2680(a).

2. Whether the district court abused its discretion in refusing to admit testimony of petitioners' expert witness on the ground that he lacked sufficient experience with the particular strain of bacteria at issue.

3. Whether there was sufficient evidence to support the district court's findings that the Army's conduct was reasonable and, in any event, was not the cause of petitioners' decedent's death.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 696 F.2d 1229. The findings of fact and conclusions of law of the district court (Pet. App. A9-A49) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1983. The petition for a writ of certiorari was filed on April 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September 1950, the Department of the Army conducted six simulated biological warfare attacks on San Francisco, California, to determine the feasibility and effect of such an attack if undertaken by a hostile nation (Pet.

App. A11). The idea for the tests originated in a report in 1946 by the Committee on Biological Warfare in the Office of the Secretary of Defense. The report concluded that the United States could be vulnerable to biological warfare and recommended basic field tests to determine precisely how vulnerable the nation, and particularly our coastal areas, might be to such attacks (*id.* at A20). The Secretary of Defense approved the recommendation (*ibid.*).

In 1949, the Chief of the Army Chemical Corps was assigned responsibility for all phases of planning and research regarding biological warfare. Initial tests, conducted at the Pentagon and on naval vessels, involved the exposure of humans to a strain of bacteria known as *Serratia marcescens*. After these tests it was decided that the United States' vulnerability to a biological attack could only be determined fully by simulating such an attack on a large metropolitan area. San Francisco was selected because, as a port city, it offered a realistic target for enemy ships. Coordination of the simulated attack was headed by General McAuliffe, the Army's Chief Chemical Officer. Acting on the basis of a general authorization from the Secretary of Defense to conduct field tests,[1] he chose the test site, the attack plan and the strain of bacteria to use (Pet. App. A25-A26). Pursuant to General McAuliffe's approval, the bacteria *Serratia marcescens* were released via an aerosol on September 26 and 27, 1950, from a navy vessel off the coast of San Francisco (*id.* at A11).

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[1] The 1946 report stated that an "innocuous organism" should be used for the field tests (Pet. App. A26). Physicians who recommended *Serratia marcescens* as the most suitable bacteria believed that they were following that direction (Pet. 3). But nothing in the record indicates precisely what factors motivated General McAuliffe's final decision to use *Serratia marcescens* as opposed to other available strains of bacteria.

2. On October 1, 1950, Edward Nevin, petitioners' decedent who had then recently had a prostate operation, developed a fever and was hospitalized (Pet. App. A11). Bacteria in his body were isolated, but antibiotic treatment was unsuccessful and Nevin died on November 1, 1950. In July 1978, petitioners, Nevin's relatives, filed this suit in the United States District Court for the Northern District of California under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, alleging that the Army's bacteriological warfare experiments in San Francisco, which petitioners first learned about in 1976, had caused Nevin's death.

The district court entered judgment for the United States (Pet. App. A9-A49). The court held first that the decisions made by General McAuliffe with regard to whether and how to proceed with the bacteriological field tests were policy decisions reached at the highest levels of the Army and Department of Defense and accordingly were immune from suit under the discretionary function exception to the Tort Claims Act, 28 U.S.C. 2680(a) (Pet. App. A12-A26). In addition, the court held that there was no negligence in the decision to use *Serratia marcescens* in the experiment because the available evidence in 1950 indicated that the particular bacterium was not harmful to humans (*id.* at A27-A39). Finally, the court held that the evidence did not support a finding that Nevin had died from the bacteria released by the Army; the Army's test results indicated that all of the released bacteria had died before the germs reached San Francisco (*id.* at A39-A42). The court found that Nevin had been infected long before the Army's experiments and that the cause of Nevin's death was a virulent strain of bacteria that had developed in the hospital and that was resistant to antibiotics (*id.* at A42-A43).

3. The court of appeals vacated the district court's judgment and remanded for dismissal of petitioners' suit on the ground that the district court lacked subject matter

jurisdiction (Pet. App. A1-A7). The court of appeals held that petitioners' claim was based solely on the decision to use *Serratia marcescens*, which the court found was a matter committed to the discretion of General McAuliffe, the Army's Chief Chemical Officer. The court of appeals found that General McAuliffe's decision to use this strain of bacteria required him to weigh, *inter alia*, "concerns for national security, a need for secrecy, the possible risks of urban testing, and applicable medical concerns" (*id.* at A5). Such a decision, the court held, was precisely the kind of determination Congress intended to immunize from judicial second-guessing in the guise of a tort suit when it enacted 28 U.S.C. 2680(a).

Judge Norris dissented from the order vacating the district court's judgment; instead, he would have affirmed on the ground that the evidence supported the district court's finding that Nevin's death was not caused by the Army's bacteria (Pet. App. A7).[2]

ARGUMENT

Petitioners argue (Pet. 12) that the court of appeals erred in applying the discretionary function exception based solely on "the echelon of the official making the decision," instead of adopting a " 'basic policy decision' test" — followed by "more enlightened courts" — that "focuses on the nature of the decision that was made" (Pet. 11, 13). Contrary to petitioners' assertion (Pet. 11), however, the court of appeals did not rely solely on General McAuliffe's high ranking position in the Army. The court based its ruling, in part, on a determination that General McAuliffe's decision

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[2]Judge Norris rejected the government's discretionary function argument. He was of the view that the decision to choose a particular strain of bacteria was a medical-scientific judgment implementing the broader policy decision to engage in field experiments in San Francisco (Pet. App. A6-A7).

as to which bacteria to use was a "basic policy determination" that required the weighing of political, social, military and economic factors (Pet. App. A5). Moreover, the court's focus on General McAuliffe's policymaking position was certainly a relevant factor in deciding whether to apply Section 2680(a). As petitioners admit, the decision maker's position in the government is "useful as a general guide" even if not dispositive (Pet. 13, citing L. Jayson, *Handling Federal Tort Claims* § 29.07 (1982)). In sum, the decision at issue in this case is a classic example of a discretionary function as defined by this Court in *Dalehite* v. *United States*, 346 U.S. 15, 42 (1953): "The decisions * * * were all responsibly made at a planning * * * level and involved considerations * * * important to the practicability of the Government's * * * program."

In any event, even if the discretionary function issue were less clear, this case still would not be worthy of review in light of the findings of the district court regarding the reasonableness of the Army's choice of the bacteria used and the inadequacy of petitioners' proof on causation. As Judge Norris found, there is substantial evidence to support the district court's conclusion that the Army's actions did not cause Nevin's death. Petitioners challenge (Pet. 24-25) those factual findings and the district court's refusal to allow one of their experts to testify because of insufficient experience, but those claims, which are of importance only to this case, do not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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